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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RAFAEL, Defendant and Appellant.	G055925 (Super. Ct. No. 17CF1814) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed in part and reversed in part.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel J. Hilton and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant was found guilty of robbery (Pen. Code, §§ 211, 212.5, subd. (c); count 1).[1] He was found not guilty of the second charged count, assault with a deadly weapon (to wit, a beer bottle), but was found guilty of the lesser included simple assault. (§ 240; count 2). The court suspended imposition of sentence and instead placed defendant on probation.

On appeal, defendant contends the court should have granted his section 1118.1 motion at the close of the People's evidence because there was inadequate evidence of a theft. Defendant also contends the court erred in refusing to give a pinpoint instruction defendant had requested concerning the use of force or fear after abandoning stolen property. Finally, defendant contends certain probation conditions were overbroad. While we find the evidence was sufficient to support the verdict, and thus the court did not err in denying the section 1118.1 motion, we find the court did prejudicially err in denying defendant's pinpoint instruction concerning abandonment. Because we reverse the robbery conviction, we need not address defendant's contention that his probation conditions were overbroad.

FACTS

The People presented the testimony of four witnesses, none of whom was the actual victim.

The first was a mail carrier who testified that on the day in question she was delivering mail near the intersection of Tustin Street and Briardale Avenue in the City of Orange. At the corner of that intersection, there was a liquor store next to a furniture store. The mail carrier recognized the owner of the liquor store by sight because she regularly delivered mail there. She arrived in the area of the liquor store in the early

[1] All statutory references are to the Penal Code.

afternoon and heard shouting. She looked up to see the owner following defendant through a strip mall parking lot across the street from the liquor store. The owner was calling out repeatedly, "Please call 911." While running away from the owner, defendant, who held a pack of beer, was looking back and throwing bottles of beer at the owner. The mail carrier saw at least two bottles being thrown. The mail carrier could not tell if defendant was trying to hit the owner, or simply scare him. The mail carrier called 911 and told the dispatcher that defendant "broke into the store and stole beer and he's throwing the beer at" the owner.

A second person who was parked across the street from the liquor store anonymously called 911 to report the incident. The caller reported, "There's a guy that just stole something from a liquor store . . . ." The owner chased defendant, but then the chase apparently swapped roles and defendant began chasing the owner. The caller reported defendant "stole beer and is throwing stuff" at the owner. The caller elaborated, "It looks like he took like a case of beer, yeah. And he ran off with it, the guy chased him, and then guy that stole it was throwing the cans at the owner." The confrontation then escalated: "the guy who stole it is grabbing the guy, like by the shoulders and pushing, he just pushed him into the window." The caller then reported that defendant walked toward a residential area where a car was waiting for him with doors open. Defendant got into the car and drove away.

The People's third witness was the owner of the furniture store located next to the liquor store, who is also the liquor store owner's nephew. On the day of the incident, the nephew was working in the back of his store when he heard his uncle yelling in front. The nephew went to the front of the store to check on his uncle who had entered the store. The nephew stepped outside and saw defendant standing there with a beer bottle in hand. Defendant looked angry and was approaching the furniture store to enter when the nephew shut the doors behind him and told him not to come in. Defendant then pushed the nephew, cussed at him, and made threats. Defendant raised the bottle up as if

to hit the nephew, but the nephew grabbed the bottle out of defendant's hand. By this time the liquor store owner (the uncle) had returned with a phone to call the police, at which point defendant walked away.

A police officer responding to the call saw a vehicle matching the description of the vehicle defendant had entered and initiated a stop. The vehicle's license plate had been covered up with cloth. The driver was defendant's mother.

At this point, the People rested and defendant brought a section 1118.1 motion, contending the People had not proven a robbery. This was largely based on the absence of testimony from the victim. Defendant renews that contention on appeal, which we discuss below.

After the motion was denied, defendant testified on his own behalf. Defendant admitted he stole the beer but testified he did not attack the owner with it. Instead, he "tossed" a beer underhand at the owner, telling him, "catch," so he knew it was coming. The owner caught it. Defendant testified that he simply wanted to give the beer back and leave. Afterward, he dropped the remainder of the case on the ground. The owner ran back to his store, and defendant turned toward his car. On his way, the nephew confronted defendant and shoved him, so defendant shoved back. Defendant denied having a beer bottle in his hand during the confrontation with the nephew. Immediately after the shoving, defendant went to his car.

On cross-examination, defendant admitted that he and his mother had been drinking before the incident. Defendant and his mother were on their way to a tattoo parlor when they decided to get beer. Defendant had no money and intended to steal the beer.

DISCUSSION

Denial of the Section 1118.1 Motion

Defendant first contends the court erred in denying his section 1118.1 motion after the close of the People's evidence. That section provides, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." (*Ibid*.) In deciding such a motion, the trial court applies the substantial evidence standard, which we likewise apply on appeal. (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 780.)

Here, the court denied defendant's motion, but in its words, only "barely." The problem was that the owner did not testify, and thus there was no evidence of what had transpired in the liquor store, and thus no direct evidence of a theft. In denying the motion, the court principally relied on statements from the mail carrier and the anonymous 911 caller stating that defendant had stolen beer. On appeal, defendant challenges that reliance: "neither caller observed appellant take anything; rather, they simply assumed a theft had occurred." We agree. The mail carrier never testified she was inside the liquor store. And,the anonymous caller was parked across the street.

Nevertheless, while there was no direct evidence of a theft, there was sufficient circumstantial evidence to support the judgment. The following circumstances are particularly relevant: the owner was chasing defendant, who was holding a case of beer; the owner was panicked and calling out for bystanders to call 911; defendant threw two bottles at the owner, and then abandoned the beers; defendant chased the owner back to the furniture store; and at the end of it all, defendant got into a waiting car *that had its license plate covered*.

Obviously, it would have been preferable to obtain direct evidence of theft from the testimony of the owner. Circumstantial evidence is problematic when more than one reasonable inference can be drawn from the circumstances. Indeed, the jury is typically instructed, "before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence." (CALCRIM No. 224.) The key here, though, is that the alternate inference must be *reasonable*. (*Ibid.*) We can think of no reasonable inference to be drawn from the totality of circumstances listed above other than defendant stole a case of beer. Defendant, for his part, has not offered any innocent explanation of those circumstances. Accordingly, the court properly denied defendant's section 1118.1 motion.

Refusal of the Abandonment Instruction

Defendant's second argument is that the court erred in refusing to give a pinpoint instruction defendant requested on abandonment. A trial court must instruct the jury sua sponte on all general principles of law that are """closely and openly connected to the facts and that are necessary for the jury's understanding of the case."""" (*People v. Burney* (2009) 47 Cal.4th 203, 246.) In addition, a criminal defendant is entitled, on request, to "instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) Upon such request, the defendant "is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt . . . ." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230.) A defendant has a right to an instruction pinpointing the theory of defense if the theory proffered by the defendant is supported by substantial evidence, the instruction is a

correct statement of law, and the proposed instruction does not simply highlight specific evidence the defendant wishes the jury to consider. (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1174.) Conversely, a trial court may refuse a proposed pinpoint instruction "'if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].'" (*People v. Burney*, *supra*, 47 Cal.4th at p. 246.)

Here, defendant requested the following instruction: "If a suspect surrenders goods that he or she initially obtained through theft, and after such surrender uses force or fear on an employee of a store, that force does not result in a robbery." The instruction is based on *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*), which the parties discuss at some length on appeal.

In *Hodges*, the defendant was found guilty of, inter alia, robbery. (*Id.* at p. 533.) The evidence showed the defendant had entered a store, placed merchandise in a plastic bag he had brought in, and exited the store without paying. (*Id.* at p. 535.) A loss prevention officer (LPO) followed the defendant out of the store and confronted the defendant while he was behind the wheel of his car with the driver's side door open. (*Id.* at p. 535.) The defendant offered to give the items back to the LPO, but the LPO refused (*ibid*.), telling defendant he would need to return to the store (*id*. at pp. 535-536). The defendant started his engine, prompting the LPO to walk around to the rear of the vehicle to take down the license plate number. (*Id.* at p. 536.) Meanwhile, a second LPO approached the driver's side, instructing the defendant to return to the store. Instead, the defendant shoved the items into the second LPO's chest, and reversed out of the parking spot. The second LPO quickly recovered and reached into the defendant's vehicle in an unsuccessful attempt to take the keys out of the ignition. Instead the LPO was dragged backwards with the vehicle. (*Ibid.*)

As here, the defendant in *Hodges* requested an instruction on abandonment of the goods, which the trial court refused. (*Hodges*, *supra*, 213 Cal.App.4th at p. 537.)

During deliberations, the jury sent the following written question: "'Robbery (Penal Code 211) Point 4 states "The defendant used force or fear *to take the property* or to prevent the person from resisting." [¶] As stated, the defendant would be guilty here *only* if force or fear was used during the commission of the theft. [¶] However, the force/fear was subsequent to the act, in the parking lot, after the defendant had surrendered the goods (throwing them at [the LPO]). [¶] Does the timing/sequence of events—theft, *then* force/fear bear on the applicability of this clause—would point 4 apply here?'" (*Id.* at p. 538.) Over the defendant's objection, the court responded: "With regard to Count 1, Penal Code 211, the theft is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards. Thus, item 4 of the instruction 1600 applies to the confrontation in the parking lot." (*Ibid.*)

The *Hodges* court reversed, finding the court had "failed to address the jury's inquiry regarding the legal impact of defendant's surrender of the goods and the relationship of that conduct to the required use of force." (*Hodges, supra,* 213 Cal.App.4th at p. 542.) The trial court had replied to the jury with guidance on the escape rule, but that was misleading because "it allowed the jury to conclude defendant was guilty of robbery without regard to whether defendant intended to permanently deprive the owner of the property at the time the force or resistance occurred." (*Id.* at p. 543.) In reaching this conclusion, the *Hodges* court dropped the following footnote: "Consider the following hypothetical: A person leaves a store without paying for goods, drops the goods when confronted by a security guard, and flees; the guard gives chase and at some point during the pursuit, the person uses force to resist the pursuing guard's attempt to detain him. Under this hypothetical, the escape rule, concerning the *duration* of the offense, is not in play because no robbery was *committed,* there being no evidence that the person intended to deprive the owner of the property at the time force was used." (*Id.* at p. 543, fn. 4.)

Here, there is a version of the facts that the jury could have reached in which an abandonment instruction would have been applicable. The evidence was characterized by a number of conflicts, owing largely to the fact that defendant testified. To reach a version of the facts where an abandonment instruction was relevant, first the jury would have to credit defendant's testimony that he did not attack the owner by throwing beer bottles, but instead tossed one bottle gently. And as it turns out, there is corroborating evidence for that testimony: the fact that the owner was holding an unbroken beer bottle when he arrived at the furniture store. Moreover, defendant was charged with assault with a deadly weapon, to wit, a beer bottle, but the jury found defendant *not guilty* on that charge, which suggests the possibility that the jury credited defendant's testimony on that front. Second, the jury would have to credit defendant's testimony that he abandoned the beer. This testimony was corroborated by the fact that defendant did not attempt to take the beer with him to his getaway car. Third, for consistency on the assault count, the jury would have to reject defendant's testimony that, after abandoning the beer bottles, he simply walked toward his car, as opposed to angrily chasing the store owner. But again, there are grounds to support that resolution of the evidence: why would the liquor store owner be running to the furniture store if defendant were calmly walking toward his car? And, of course, the nephew's testimony supports this inference. Moreover, once again, the jury's verdict is consistent with this resolution of the evidence: the simple assault conviction may well have been based on the chase.

On this resolution of the evidence, defendant did not commit robbery under the *Hodges* rationale because he abandoned the beer before using force or fear. And since this resolution of the evidence is supported by substantial evidence, the court erred in refusing defendant's proposed instruction.

The People contend this case is more akin to *People v. Pham* (1993) 15 Cal.App.4th 61 (*Pham*), which we find distinguishable. There, the defendant claimed the evidence was insufficient to support a robbery conviction because after taking the

victim's bag, and just as the chasing victim caught up to him, the defendant dropped the bag and began punching the victim, but was ultimately subdued in the scuffle and never picked up the bag again. (*Id.* at pp. 64-65.) The court concluded this was robbery nonetheless because "[t]he asportation continued while defendant struggled with the victims and prevented them from immediately recovering their goods." (*Id.* at p. 65.)

The crucial difference between the present case and *Pham* is the standard of review: the *Pham* court was looking for any evidence to support the verdict; we, on the other hand, are considering whether any substantial evidence supported the giving of defendant's proposed instruction. While it was certainly possible for the jury here to conclude defendant did not abandon the property, in which case an abandonment instruction would be unnecessary, it was also possible for the jury to conclude defendant did abandon the property. As the *Pham* court acknowledged, "If defendant truly abandoned the victims' property before using force, then, of course he could be guilty of theft, but not of an *Estes*-type robbery." (*Pham, supra*, 15 Cal.App.4th at p. 68.) The instructions must be responsive to all of the evidence in the case, not just the evidence favoring the People.

Having concluded the court erred, we must decide whether the error was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*See People v. Ervin* (2000) 22 Cal.4th 48, 91 [analyzing instructional error under the *Watson* standard].) Under that standard, we must consider whether, upon reviewing the record, we are of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.) A reasonable probability under *Watson* "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918.)

We conclude there is a reasonable chance the error affected the outcome. During closing arguments, the prosecutor argued that the chase back to the furniture store

satisfied the fear element of a robbery. And, as in *Hodges*, the jury was instructed on the escape rule as follows: "The crime of robbery continues until the perpetrator has actually reached a place of temporary safety." In the absence of an abandonment instruction, the jury could have concluded that, notwithstanding the abandonment, the robbery continued as defendant chased the liquor store owner. Moreover, as we described above, the substantial evidence the jury would have to rely on to viably raise an abandonment defense was all corroborated and consistent with the actual verdict the jury ultimately rendered.

The People argue the error must be harmless because the jury found defendant guilty of assault, and the only possible assault was throwing the beer bottles, which occurred before the ostensible abandonment. The People argue the chase after the abandonment could not have constituted the assault, and thus the jury necessarily rejected the factual findings that would be required to make an abandonment instruction relevant. But they offer no legal authority or any logical basis for their assertion that a chase cannot amount to an assault.

Based on the basic principles governing assaults, we conclude a chase could form the basis for an assault conviction. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "'An assault is an attempt to commit a battery. [Citation.] Assault . . . is termed a "general intent" crime because it is not necessary to find a specific intent to cause a particular injury. What is required, however, is the general intent to willfully commit a battery, an act which has the direct, natural and probable consequences, if successfully completed, of causing injury to another. [Citations.] Intent to frighten or mere reckless conduct is insufficient.'" (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1734.)

Here, the jury could have found that defendant chased the liquor store owner into the furniture store with the intent to commit a battery. The evidence corroborating that finding would be that defendant, in fact, did get into a shoving match

with the nephew at the furniture store. As defendant points out, in *People v. Tran* (1996) 47 Cal.App.4th 253, the court found sufficient evidence of an assault where the defendant chased victims with a knife in hand, which "demonstrate[d] a willful attempt to use physical force against the victims he was pursuing." (*Id.* at pp. 261-262.) The People attempt to distinguish *Tran* on the ground that, here, defendant was not wielding a weapon (at least on this version of the facts). But as defendant points out, "assault requires no weapon and may instead be with fists or feet." If the jury was persuaded that defendant was chasing the liquor store owner with the intent to commit a battery with fists or feet, that was a sufficient basis for an assault conviction. Accordingly, the jury's verdict is consistent with the factual findings that would be necessary to raise an abandonment defense.

DISPOSITION

The judgment on count 1 (robbery) is reversed. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.